

No. 16,052

United States Court of Appeals

For The Ninth Circuit

APACHE POWDER COMPANY, a  
corporation.

*Appellant,*

v.

THE ASHTON COMPANY, INC.,  
CONTRACTORS AND ENGINEERS,  
formerly ASHTON BUILDING COM-  
PANY, and MARDIAN CONSTRUC-  
TION COMPANY, corporations  
engaged in Joint Venture as ASH-  
TON-MARDIAN COMPANY; and THE  
TRAVELERS INDEMNITY COMPANY,  
a corporation,

*Appellees.*

Appeal from the  
United States Dis-  
trict Court for the  
District of Arizona

APPELLANT'S OPENING BRIEF

EVANS, KITCHEL & JENCKES  
807 Title & Trust Building  
Phoenix, Arizona  
Attorneys for Appellant

FILED

AUG 27 1958



## TABLE OF CONTENTS

	Page
JURISDICTION .....	1
STATEMENT OF THE CASE.....	3
QUESTIONS INVOLVED .....	19
SPECIFICATIONS OF ERRORS RELIED UPON.....	19
SUMMARY OF ARGUMENTS.....	23
ARGUMENTS .....	24
CONCLUSION .....	50
APPENDIX .....	51
INDEX OF EXHIBITS.....	61

## CITATIONS

### Cases

	Page
<i>National Shawmut Bank of Boston v. Topas</i> , C.C.A. Mass., 60 F. 2d 467.....	40
<i>Fleisher Eng. &amp; Constr. Co. v. U. S. For Use and Benefit of Hallenbeck</i> , N. Y. 1940, 61 S. Ct. 81, 311 U.S. 15, 85 L. Ed. 12, 14.....	44, 46
<i>Liebman v. U.S. For Use of California Electric Supply Co.</i> , C.C.A. 9th Cir. 1946, 153 F. 2d 350, 352.....	44
<i>Hawaii v. Mankichi</i> , 190 U.S. 197, 213, 23 S. Ct. 787, 47 L. Ed. 1016, 1021.....	44
<i>Coffee et al. v. U.S. For Use and Benefit of Gordon</i> , C.C.A. 5th Cir. 1946, 157 F. 2d 968, 969.....	46
<i>Bowden v. U.S. For the Use of Malloy</i> , C.C.A. 9th Cir. 1956, 239 F. 2d 572, 577.....	47
<i>Houston Fire &amp; Cas. Ins. Co. v. U.S. For the Use of Trane Company</i> , C.C.A. 5th Cir. 1954, 217 F. 2d 727, 729....	48

### Statutes

40 U.S.C.A. § 270a.....	3
40 U.S.C.A. § 270b.....	2, 20, 22, 25

### Treatises

66 C.J.S., Notice, § 11b(4) (b), page 646.....	39
--	----

# United States Court of Appeals

For The Ninth Circuit

---

---

APACHE POWDER COMPANY, a  
corporation.

*Appellant,*

v.

THE ASHTON COMPANY, INC.,  
CONTRACTORS AND ENGINEERS,  
formerly ASHTON BUILDING COM-  
PANY, and MARDIAN CONSTRUC-  
TION COMPANY, corporations  
engaged in Joint Venture as ASH-  
TON-MARDIAN COMPANY; and THE  
TRAVELERS INDEMNITY COMPANY,  
a corporation,

*Appellees.*

---

No. 16,052

Appeal from the  
United States Dis-  
trict Court for the  
District of Arizona

APPELLANT'S OPENING BRIEF

---

## JURISDICTION

The above-entitled proceeding arises upon an appeal from a judgment entered in an action by United States of America, for

the use of Apache Powder Company, a corporation, against The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in joint venture as Ashton-Mardian Company, The Travelers Indemnity Company, a corporation, and Pioneer Constructors, a corporation, brought under the Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b (Appendix 52), known as the Miller Act, on the payment bond of the contractor under a contract with the United States of America which was to be and was performed and executed within the District of Arizona.

The jurisdiction of the District Court rests upon the provision of said § 270b that every suit instituted under § 270b shall be brought in the name of the United States for the use of the person suing, in the United States District Court for the district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit.

The District Court sitting without a jury separately tried the issues under the Miller Act between use plaintiff Apache Powder Company, appellant herein, and defendants Ashton-Mardian Company and the Travelers Indemnity Company, appellees herein, and defendant, Pioneer Constructors, a corporation, on the first count of the amended complaint praying for judgment for \$18,947.96, with interest and costs (R 45), answer of Ashton-Mardian Company (R 10), motion for more definite statement of Hartford Accident and Indemnity Company, the third party defendant (R 13), plaintiff's response to third party defendant's motion for more definite statement (R 15), answer of defendant Pioneer Constructors (R 16), answer of third party defendant to plaintiff's complaint (R 18), and answer of defendant The Travelers Indemnity Company (R 22), with the right of all parties to participate and to offer evidence within those issues (R 26).

The District Court ordered entry of a separate final judgment on the issues tried in favor of The Ashton Company, Inc., Con-



tractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in joint venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, and against United States of America, for the use of Apache Powder Company, a corporation, and judgment in favor of United States of America, for the use of Apache Powder Company, a corporation, and against Pioneer Constructors, a corporation, in the sum of \$18,947.96, with interest and costs (R 79), and the judgment from which appeal has been taken was entered on April 3, 1958 (R 79).

The judgment being final, the present appeal is predicted upon 28 U.S.C.A. § 1291.

### STATEMENT OF THE CASE

On March 30, 1956, appellee Ashton-Mardian Company entered into a written contract (R 106), with the United States of America, Corps of Engineers, United States Army (Plaintiff Armco's exhibit 3 marked for identification), under which Ashton-Mardian Company agreed to furnish material and perform work for the construction and completion of Air Force Station TM-181, a radar station five miles North of Ajo, Arizona, in accordance with plans and specifications and terms and conditions therein specifically set forth, for \$2,351,637.00. [Alleged in paragraph III of amended complaint (R 45), and admitted in answers of Ashton-Mardian Company (R 10), Pioneer Constructors (R 16), Hartford Accident and Indemnity Company (R 18), and The Travelers Indemnity Company (R 22).]

On March 30, 1956, pursuant to Act of Congress of August 24, 1935, c. 642, § 1, 49 Stat. 793, 40 U.S.C.A. § 270a (Appendix 51), known as the Miller Act, and pursuant to the terms of said contract, appellee Ashton-Mardian Company, as principal, and appellee The Travelers Indemnity Company, as surety, executed and delivered to the United States of America their payment bond for \$940,655.04 (Plaintiff Armco's exhibit 3 marked for identification), the condition of which bond, as required by the

Miller Act, being that the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided in said contract. [Alleged in paragraph IV of amended complaint (R 45), and admitted in answers of Ashton-Mardian Company (R 10), Pioneer Constructors (R 16), Hartford Accident and Indemnity Company (R 18), and The Travelers Indemnity Company (R 22).]

Ashton-Mardian Company, as the prime contractor under said contract with the United States of America, entered into a subcontract with Pioneer Constructors (R 106) (Plaintiff Armco's exhibit 6 in evidence) dated March 30, 1956 (R 107), for the performance and completion of certain parts of the work under said prime contract, specified in said subcontract, in accordance with the plans and specifications and terms and conditions of said prime contract, for \$401,217.83. This subcontract applied principally to the construction of the roadway on the Ajo job (R 108, 109).

After the execution of its subcontract Pioneer Constructors, who had dealt with appellant Apache Powder Company for material for other jobs (R 186), and had an open account with Apache Powder Company (R 187), entered into an agreement with Apache Powder Company (R 186, 187), under which it was agreed that Apache Powder Company would furnish to Pioneer Constructors the material consisting of explosives and blasting supplies required by said subcontractor under said subcontract for use in the prosecution of the work under its subcontract and said prime contract with the United States of America, and Pioneer Constructors would pay for such material at the usual list prices less contractors' discounts, which were then known to said subcontractor (R 215).

From and including June 13, 1956, to and including March 12, 1957 (R 187), on an open account on a series of special orders (R 187), Apache Powder Company furnished material consisting of explosives and blasting supplies (Plaintiff Apache's



exhibit 3 in evidence) for use in the prosecution of the work specified in Pioneer Constructors' subcontract and in said prime contract with the United States of America, of the agreed and reasonable value of \$33,453.71 (Plaintiff Apache's exhibit 4 in evidence) (R 215, 216). Such material was delivered by Apache Powder Company on said radar station job (R 187), and was used in the prosecution of the work specified in Pioneer Constructors' subcontract and in said prime contract with the United States of America ( R 32).

Beginning on June 13, 1956, said special orders for such material were given by Pioneer Constructors, and such material was billed, shipped, and delivered to Pioneer Constructors (Plaintiff Apache's exhibit 3 in evidence) (R 188), and charged to Pioneer Constructors on its open account (Plaintiff Apache's exhibits 4 and 5 in evidence) (R 192). Paul A. Swagerty, who was construction superintendent for Pioneer Constructors and later for Construction Materials Company (R 249, 250), ordered most of such material, phoning the orders to Apache Powder Company at its office at Benson, Arizona (R 239). Paul Negley, the shipping clerk and billing clerk in the accounting department of Apache Powder Company (R 238), received most of said orders, and received a number of them from Paul A. Swagerty (R 239).

During the latter part of November, 1956 (R 112), without any notice or knowledge thereof by Apache Powder Company (R 200, 201), Pioneer Constructors and Construction Materials Company, with J. E. Skorpick and Thomas E. Moore representing both companies, and Ashton-Mardian Company agreed that Construction Materials Company would take over the subcontract of Pioneer Constructors on said Ajo job as of November 1, 1956 (R 112, 117), on two conditions. Construction Materials Company had previously been engaged in the construction materials business, and had done no construction work (R 257), and Ashton-Mardian Company required that the work proceed under the same management, and with the same personnel and equipment as under the Pioneer Constructors subcontract (R

132). The second condition was that Construction Materials Company execute and deliver to Ashton-Mardian a new subcontractor's bond, with acceptable surety, preferably the same as the surety on the Pioneer Constructors bond, for performance and payment under Construction Materials Company's subcontract (R 123).

Thereafter a subcontract (Plaintiff Armco's exhibit 7 in evidence) from Ashton-Mardian Company to Construction Materials Company was prepared, dated November 1, 1956, and signed by Construction Materials Company, but not executed and delivered by Ashton-Mardian Company until January 8, 1957 (R 124, 125), when Construction Materials Company's subcontractor's bond to Ashton-Mardian Company was executed and delivered to Ashton-Mardian Company. The subcontract to Pioneer Constructors was terminated at the same time (R 125). Apache Powder Company had no notice or knowledge of the termination of the subcontract to Pioneer Constructors or the execution and delivery of the subcontract to Construction Materials Company at that time, and did not learn thereof until March 19, 1957 (R 200, 201), after Apache Powder Company had delivered the last of such material on the Ajo job on March 12, 1957 (R 187).

In the meantime, beginning November 4, 1956, Construction Materials Company took over the payroll (R 158, 161), and the work specified in the Pioneer Constructors subcontract which had not then been completed, which was estimated as of October 31, 1956, to amount to \$266,391.66 (R 120, 131). This was done before J. E. Skorpick and Thomas E. Moore, representing Construction Materials Company, approached Harold Ashton in the last half of November, 1956, for a new subcontract to Construction Materials Company (R 112). After the agreement with Ashton-Mardian Company for a new subcontract, Construction Materials Company's taking over the work was subject to the requirement by Ashton-Mardian Company that a new subcontractor's payment and performance bond, with acceptable surety, be furnished by Construction Materials Company to Ashton-Mardian Company, and Ashton-Mardian Company held Pioneer

Constructors liable and responsible on its subcontract and bond until the execution and delivery of the Construction Materials Company subcontract and bond on January 8, 1957, and Ashton-Mardian Company made no payments to Construction Materials Company until after the new bond was furnished (R 125, 126).

In Section 1 on the face of the Pioneer Constructors subcontract (Plaintiff Armco's exhibit 6 in evidence) see Appendix 53, and in Section 1 on the face of the Construction Materials Company subcontract (Plaintiff Armco's exhibit 7 in evidence) see Appendix 56, the work specified to be performed is identical (R 116, 128). The supplemental sheets attached to the subcontracts show that the items to be performed are identical, (with the exception of Item 30 which had been completed by Pioneer Constructors), and the unit prices are identical, the differences being in the quantities to be performed or supplied, the extensions of the amounts, and the total (R 128). Pioneer Constructors' subcontract is No. 7 and Construction Materials Company's subcontract is No. 128, but the supplemental sheet attached to the Construction Materials Company subcontract is entitled "Supplemental Sheet to Subcontract No. 7" (R 119).

In completing the work originally specified in Pioneer Constructors' subcontract, as required by Ashton-Mardian Company, Construction Materials Company used the same offices as Pioneer Constructors (R 149), operated under the same management, took over the payroll (R 158) and employed substantially the same personnel, and used substantially the same equipment (R 120). The name of Pioneer Constructors was on some of the equipment, and the name of Construction Materials Company did not appear on any of the equipment until after the first of the year 1957 (R 121, 122).

Apache Powder Company had no notice or knowledge of this change-over from Pioneer Constructors to Construction Materials Company in the performance of the work until March 19, 1957 (R 200, 201), after it had delivered the last of the material on the Ajo job on March 12, 1957 (R 187).



During the period it was furnishing material for use on the Ajo job, Apache Powder Company through its field engineers periodically visited the work and checked on its progress (R 201). These field engineers were there to do the servicing required by the contractor, watch the progress of the work, the personnel, and the equipment, and to watch particularly to determine when the job was nearing completion (R 201, 202). The field engineers reported that the work was progressing without any interruption in the schedule, and without any change in management, personnel, or equipment (R 215), and Apache Powder Company continued to supply powder and blasting supplies on the job (R 215).

Apache Powder Company had not received any payments from Pioneer Constructors for the material furnished prior to November 1, 1956 (R 220), and was aware of this situation (R 224). It was not the policy of Apache Powder Company to let accounts run without payments for several months, but it was not unusual with this type of work with contractors (R 228, 229). It didn't like to go to the prime contractor and embarrass the subcontractor, if it could be avoided. It had men in the field who watch the jobs, and they reported nothing unusual. It relied on the payment bond of the prime contractor in all cases of contract work (R 229). There is a competitive angle in the industry, and it is customary to go along with the contractors who do not pay regularly. If Apache Powder Company were to be too rigid and inflexible, it would lose a lot of business because its competitors will be liberal and in many cases more liberal (R 231).

Upon the receipt of an order, the procedure followed at the office and plant of Apache Powder Company was as follows: The billing and shipping clerk prepares a factory order, copies of which were distributed in the office and plant, and a copy mailed to the purchaser (R 187). This factory order is the form of record and acknowledgement of the order (R 187). Then the bill of lading for the shipment is prepared, with a form at the bottom for the receipt by the purchaser of the shipment, and the bill of lading is forwarded with the shipment (R 192). Then an invoice of the

order is prepared, a copy mailed to the purchaser (R 192), and a copy sent to the accounting department from which the account of the purchaser is charged. Then monthly statements of the account are sent to the purchaser (R 197).

On December 4, 1956, Paul A. Swagerty phoned to Paul Negley at the Apache Powder Company office in Benson, Arizona, giving an order for some material (R 240). Paul Negley testified (R 240), that he made a pencilled note of the contents of the conversation, the statements made, which is the first pencilled sheet attached to the factory order of December 4, 1956, one of the factory orders of Plaintiff Apache's exhibit 3 in evidence. Paul Negley further testified (R 240, 241):

Q. What generally does that pencilled note contain?

A. It generally contains the material that the customer wishes to have delivered.

Q. At the top left hand side appears the words, "Construction Materials Company, Construction Division, Tucson, Arizona." Do you recall the purpose of that notation?

A. Yes. Mr. Swagerty informed me upon giving me this order that the balance of the materials for the Ajo job should (210) be billed to Construction Materials Company, Construction Division, Tucson, Arizona, and that this division, this company is a division of Pioneer Constructors.

Q. Down below you have, there is a statement: "Above is division of Pioneer Constructors," with the address. You made that as a notation from Mr. Swagerty's statement?

A. Yes, sir.

Upon cross examination by Mr. Catlin, Paul Negley testified (R 243):

Q. This about the above is a division of Pioneer Constructors, you are positive Mr. Swagerty told you this and this wasn't an assumption on your part?

A. I am positive Mr. Swagerty told me that.

Paul A. Swagerty, testifying about the conversation with Paul Negley on December 4, 1956, said (R 252):

Q. Will you tell us as near as you can just what you said and what he said on that occasion? This is a long time and you can't recall the exact words, but if you can give us the substance.

A. At first I told him that future billings with regard to the Ajo work should be billed to Construction Materials, Construction Division. I don't know, I think at the time he ask me with regard to addresses, I told him that he could forward the statements to the same place he had the previous ones; that Mr. Simmons would take care of them.

Q. Do you recall anything being said about them as to the status of Construction Materials Company, whether it was or was not a division of Pioneer Constructors Company?

A. No, I don't, because I didn't know. I am a construction superintendent. I don't know what affiliates the firm has or don't have.

Q. To the best of your knowledge did you ever make a statement to Mr. Negley or anyone else that Construction Materials Company was a division of Pioneer Constructors? (225)

A. I have not.

Upon cross examination by Mr. Lester, Paul A. Swagerty testified (R 253) that he didn't know and had no way of knowing about the relationship between the two companies, but finally testified (R 254):

Q. It is entirely possible that you may have said something that caused Mr. Negley to jot down the notation he did about your conversation?

A. I am not denying. He could have.

Upon cross examination by Mr. Catlin, Paul A. Swagerty testified (R 255) that he did not ask that the orders be billed to Construction Materials Company on any of the later orders.

Upon further cross examination by Mr. Lester, Paul A. Swagerty made a distinction between Construction Materials Company and



Construction Materials Company, Construction Division, testifying (R 256, 257):

Q. (By Mr. Lester): I am curious to know the distinction you have just given between Construction Materials Co. and Construction Materials Co., Construction Division. Apparently there is some distinction. I noticed it in your testimony. Can you explain it?

A. Well, as I understood it from Mr. Skorpick, the Construction Division was not organized until they took over the balance of the Ajo job. Prior to that time it had been (230) a supplier of aggregate and transit mix supplies. To my knowledge it never built a project in the field, so they established Construction Materials, Construction Division.

Q. How many other division are there?

A. None that I know of. That is the one.

Q. How many have there been in the past?

A. I don't know about that. I worked for Pioneer Constructors and I worked for Construction Materials, Construction Division. There is a Construction Materials with which I have nothing to do with that supplies transit mix and aggregate to various jobs.

Q. As far as you know there is a distinction between Pioneer, Construction Materials and Construction Materials, Construction Division?

A. That is the way I take it.

Q. But you are not quite sure?

A. What?

Q. You are not quite sure what the distinction is?

A. I am sure of the firm I am working for, Construction Materials, Construction Division.

Paul A. Swagerty did not testify that he told Paul Negley there had been a change in the subcontract (R 258), and his final statement regarding the conversation with Paul Negley was (R 259):

Q. The most you told Mr. Nagley then, the most you claim you told him was to make a change in the form of billing?

A. I told him henceforth shipments to Ajo should be billed Construction Materials, Construction Division.

Melvin J. Simmons, who had been office manager and assistant secretary for Pioneer Constructors (R 148) and later was office manager, secretary, and treasurer of Construction Materials Company, also testified to a telephone conversation to someone at Apache Powder Company about billing to Construction Materials Company. He said he called on or about December 10, 1956 (R 165), and does not recall any other conversation on the subject (R 166). He testified (R 166, 167):

Q. Who did you ask for when the girl answered?

A. I asked for the bookkeeping or accounting department.

Q. Please state the substance of that conversation.

A. I explained to them that the powder being sent to Ajo should have been billed to Construction Materials because they were doing the work. I would appreciate it if they would bill it to Construction Materials. And as I recall he told me, "Pay these by invoice and get it straightened out," and that is all I remember of the conversation.

Q. Did you pay it by invoice after that?

A. Yes, sir.

\* \* \* \* \*

Q. Did you at any time to your best recollection ever represent to anyone connected with Apache Powder or to anyone (126) else that Construction Materials Company was a division of Pioneer Constructors, or words to that effect?

A. I did not, no.

Robert L. Henderson, general manager of Apache Powder Company (R 185), when informed that Melvin J. Simmons had testified on the taking of his deposition that he had made a phone call to Apache Powder Company on or about December 10, 1956, regarding billing to Construction Materials Company, made an investigation to determine if such a call had been made, and said that no such call had been made (216). He further said (R 218)

that if a call came to the accounting department of Apache Powder Company, it would be referred either to the secretary-treasurer, Mr. Schmalzel, or in his absence the assistant secretary-treasurer, Mr. Browning, and that as calls come through the switchboard they would be directed to the proper place. (Note: The name of the secretary-treasurer is J. L. Schmalzel. It is consistently spelled throughout the transcript as Schmalzer.) J. L. Schmalzel also testified (R 245) that a call to the bookkeeping or accounting department would be directed to him, or in his absence to Amos J. Browning, his assistant, and J. L. Schmalzel (R 244) and Amos J. Browning (R 246) testified that they did not receive the phone call of which Melvin J. Simmons testified.

In further examination in regard to the phone call on December 10, 1956, to Apache Powder Company, Melvin J. Simmons testified (R 179) that he didn't know whether he called the purchasing department or the accounting department, that he did not ask the name of the person to whom he talked, and that he did not ask the capacity with the company of the person to whom he talked.

In this connection it is noted that Melvin J. Simmons also testified (R 171, 172) to a conversation on or about December 10, 1956, with Gerald John Sturm of Armco Drainage & Metal Products Company, in which Melvin J. Simmons testified he said Construction Materials Company was on the job on December 10, 1956. Gerald John Sturm testified (R 105) that he had a conversation with Melvin J. Simmons on December 10, 1956, but denied that Melvin J. Simmons said that Construction Materials Company had taken over the job and at that time was subcontractor on the job and that Pioneer Constructors was no longer on the job.

Apache Powder Company's version of the testimony of Melvin J. Simmons is that he did not call on December 10, 1956, and that if he did the most he claims is that he requested that future orders be billed to Construction Materials Company, because it was

doing the work. Apache Powder Company's version of the conversation of December 4, 1956, between Paul A. Swagerty and Paul Negley is that Paul A. Swagerty requested future billing to Construction Materials Company, and also stated that Construction Materials Company, Construction Division, was a division of Pioneer Constructors.

Immediately afterward Paul Negley reported this phone conversation with Paul A. Swagerty to J. L. Schmalzel (R 242), who then was the assistant secretary and assistant treasurer of Apache Powder Company (R 238), and then the conversation was reported to R. L. Henderson, the general manager of the company (R 185). Thereafter Apache Powder Company continued to bill and ship the material to Pioneer Constructors (R 213). The arrangements for supplying explosives and loaning magazines had been made with Pioneer Constructors, the subcontractors on the job. Apache Powder Company had no notice that the subcontract with Pioneer Constructors had been terminated. Apache Powder Company had not been approached by Construction Materials Company, and had no arrangements with it for sale or delivery of explosives or for loan of magazines. The invoices to Pioneer Constructors were not returned for correction. There were no objections from Pioneer Constructors or Construction Materials Company to the continued addressing of shipments to Pioneer Constructors. ( 213) Apache Powder Company believed it was delivering the material to Pioneer Constructors under the Pioneer Constructors contract of March 30, 1956 (R 214).

Apache Powder Company made the factory order for the material ordered by Paul A. Swagerty by phone on December 4, 1956, to Pioneer Constructors, and billed, shipped, and charged it to Pioneer Constructors, and thereafter continued to bill, ship, and charge all the orders to Pioneer Constructors (Plaintiff Apache's exhibits 3 and 4 in evidence). All these orders were received from Paul A. Swagerty (R 240).

The December 4, 1956, order, and all subsequent orders were



receipted for on the bill of lading in the name of Pioneer Constructors (Plaintiff Apache's exhibit 4 in evidence).

On December 29, 1956, Apache Powder Company received a check dated December 27, 1956, for \$4,723.37, from Construction Materials Co., Construction Division, Tucson, Arizona, with a remittance slip attached (Plaintiff Apache's exhibit 11-A in evidence) stating: "Billed to Pioneer Const., Inv. 42088, 42175, 42256." These are the three invoices for material ordered for, billed and shipped to, and receipted for in the name of, Pioneer Constructors during the month of November, 1956 (Plaintiff Apache's exhibits 3 and 4 in evidence), before Paul A. Swagerty's phone call on December 4, 1956. This payment was credited by Apache Powder Company on the Pioneer Constructors' account (R 221).

Apache Powder Company considered the receipt of the check from Construction Materials Company in payment of Pioneer Constructors' invoices, and decided it was all right to accept the check and apply it on the Pioneer Constructors' account (R 214). The only statements it had received regarding Construction Materials Company were that future orders were to be billed to Construction Materials Company, Construction Division, and that it was a division of Pioneer Constructors, and the only account Apache Powder Company had on the Ajo job was with Pioneer Constructors (R 214, 215). Continued periodic visits by the field engineers to the work at Ajo resulted in reports that there were no unusual circumstances in connection with the work, the work was progressing without any interruption in the schedule, without any change in management, personnel, or equipment (R 215).

On February 13, 1957, Apache Powder Company received a check dated February 12, 1957, for \$3,417.74 from Construction Materials Co., Construction Division, Tucson, Arizona with a remittance slip attached (Plaintiff Apache's exhibit 11-B in evidence) stating: "covers the following Invoices 42291, 42308, 42406, Billed to pioneer." These are the three invoices for ma-

terial billed and shipped to, and receipted for in the name of Pioneer Constructors during the month of December, 1956 (Plaintiff Apache's exhibits 3 and 4 in evidence). This payment was credited by Apache Powder Company on the Pioneer Constructors' account (R 221).

Thereafter another inspection of the work at Ajo again disclosed that the work was progressing under the same management, and with substantially the same personnel and equipment, but that the work was nearing completion (R 202), and near the end of taking explosives in the early part of March, 1957 (R 202).

After the last material was furnished on March 12, 1957, Apache Powder Company learned from credit and press reports of litigation against Pioneer Constructors, and requested its attorneys to investigate (R 202).

An attorney for Apache Powder Company phoned Daniel Mardian of Mardian Construction Company at its Phoenix, Arizona, office on March 19, 1957, and later phoned Harold Ashton of Ashton Building Company at its Tucson, Arizona, office, and on March 19, 1957, Daniel Mardian wrote to Harold Ashton of the phone call from the attorney (Plaintiff Apache's exhibit 1 in evidence) (R 136, 137). Harold Ashton testified, on cross examination by Mr. Carr, in regard to the phone call to him (R 136):

Q. Now, Mr. Ashton, do you recall a telephone conversation with me acting at attorney for Apache Powder Company on March 19, 1957?

A. I recall a telephone conversation with you but I don't recall the date.

Q. Do you recall that I told you that the Pioneer owed Apache money for the job at Ajo and we discussed the matter and told you that I had called Mr. Mardian and Mr. Mardian had suggested my talking with you?

A. I believe I recall that.

Q. Do you recall that after discussing the matter with me



you requested that I talk to Mr. Catlin, the Ashton-Mardian attorney?

A. I believe that's right.

Q. Would you say, Mr. Ashton, that the telephone conversation wasn't held on March 19, 1957?

A. I would not say it wasn't, no.

Q. In that conversation do you recall whether or not I told you that Pioneer Constructors owed Apache Powder Company \$25,312.60 for explosives and blasting supplies delivered at Ajo and used at Ajo and that was the balance due at the time?

A. I don't remember specifically the amount. I remember it was in the \$20,000 figure.

The letter from Daniel Mardian to Harold Ashton sets forth the statement made by the attorney for Apache Powder Company of the claim by Apache Powder Company against Pioneer Constructors for material furnished to Pioneer Constructors and used on the Ajo job in the amount of the balance then due, and copies of the letter were sent (R 138) to the attorney for Ashton-Mardian Company and to Hartford Accident & Indemnity Company.

On March 19, 1957, from its attorney who had called Daniel Mardian on that date, Apache Powder Company first learned of the termination of the Pioneer Constructors subcontract and the execution of the Construction Materials Company subcontract (R 200, 201).

The last of the material Apache Powder Company had delivered on the Ajo job, prior to January 8, 1957, when the Pioneer Constructors subcontract was terminated, was on December 20, 1956 (R 196), and the oral notice to the prime contractor was given within ninety days thereafter on March 19, 1957.

Thereafter, on April 11, 1957, Apache Powder Company received a check dated April 10, 1957, for \$4,411.91, from Construction Materials Co., Construction Division, Tucson, Arizona, with a remittance slip attached (Plaintiff Apache's exhibit 11-C in evidence) stating: "Payment of the Following Invoices #42606

294.88, #42628 280.60, #42646 785.91, #42795 392.70, #42847 1286.22, #43050 1371.90." These are the six invoices for the material billed and shipped to, and receipted for in the name of Pioneer Constructors, during the months of January, February, and March, 1957 (Plaintiff Apache's exhibits 3 and 4 in evidence). This payment was credited by Apache Powder Company on the Pioneer Constructors' account (R 221), leaving a balance of \$20,900.69.

On April 25, 1957, and within ninety days from the date on which it furnished the last of the material on the Ajo job on March 12, 1957, Apache Powder Company, through its attorneys, Evans, Kitchel & Jencks by William A. Evans, mailed three copies of a written notice (Plaintiff Apache's exhibit 6 in evidence), see Appendix 59, of its claim against Pioneer Constructors, addressing one each to Ashton-Mardian Company (Joint Venture), Ashton Building Company, and Mardian Construction Company, mailed by registered mail with return receipts demanded. Apache Powder Company received the registry receipts therefor (Plaintiff Apache's exhibits 7-A, 7-B, and 7-C in evidence).

On August 14, 1957, Apache Powder Company issued a credit memorandum to Pioneer Constructors for a total of \$1,777.73 for explosives and blasting supplies (Plaintiff Apache's exhibit 8 in evidence) (R 206). This was for material returned after the work at Ajo was completed (R 207). On August 28, 1957, Apache Powder Company issued a credit memorandum to Pioneer Constructors for \$175.00 (Plaintiff Apache's exhibit 9 in evidence) for a blasting machine charged to Pioneer Constructors and used on the Ajo job, which also was returned after the work was completed.

These credit memoranda were mailed to Pioneer Constructors, P. O. Box 2768, Tucson, Arizona, and the envelope postmarked August 22, 1957 (Plaintiff Apache's exhibit 10 in evidence), was returned stamped, "Return to writer" and marked "Out of Business" (R 207, 208). They then were mailed to Construction Ma-

materials Company, and were not returned, and Construction Materials Company never made any objection to the credit memoranda being issued to Pioneer Constructors (R 208). These credit memoranda reduced the unpaid balance to \$18,947.96 (R 205).

On June 17, 1957, at the time of the filing of the complaint in the District Court, final settlement of said prime contract with the United States of America had not been made (R 138), and a period of ninety days had elapsed after the day on which the last of the material was furnished by Apache Powder Company on March 12, 1957.

### **QUESTIONS INVOLVED**

The questions involved in this appeal are:

1. Can a supplier's rights under the Miller Act be affected by a change in subcontractors, considering the circumstances surrounding such change and the extent of the supplier's knowledge of said circumstances?
2. In any event, is specific and unquestioned oral notice, given by the supplier to the prime contractor of the supplier's claim against the subcontractor, sufficient notice under the Miller Act if such notice is given within ninety days after delivery of the last of the material to the subcontractor?

### **SPECIFICATIONS OF ERRORS RELIED UPON**

The specifications of errors relied upon by appellant are as follows:

1. The District Court erred in denying Apache Powder Company's motion (R 247), made at the close of its case, for an amendment to the amended complaint to conform to the evidence, alleging that oral notice of Apache Powder Company's claim against Pioneer Constructors and Construction Materials Company was given to the prime contractor, Ashton-Mardian Company on March 19, 1957, by Apache Powder Company within ninety (90) days after the last material was furnished by

Apache Powder Company on the Ajo job on December 20, 1956, for the reasons that such proposed allegation conformed to the evidence, and was material in that such oral notice sufficiently complies with the requirement and intendment of Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a).

2. The District Court erred in finding (R 69) that Apache Powder Company did furnish material to the subcontractor, Pioneer Constructors, from June 13, 1956, to and including the 31st day of October, 1956, at the special instance and request of Pioneer Constructors of a reasonable value of \$20,900.39, without at the same time finding that the last of the material furnished by Apache Powder Company on said Ajo radar station job prior to January 8, 1957, was on December 20, 1956, such additional findings being material and being required by the undisputed evidence on these points.

3. The District Court erred in finding (R 69) that Pioneer Constructors ceased the doing of any work on the Ajo job on October 31, 1956, and Construction Materials Company did perform all work encompassed under Pioneer Constructors' subcontract done on and after November 1, 1956, without at the same time finding that until January 8, 1957, Pioneer Constructors was held responsible and liable under its subcontract and bond to the prime contractor by Ashton-Mardian Company, the prime contractor, and that from and including November 1, 1956, to and including January 8, 1957, the work performed by Construction Materials Company on said job was preformed under the same management, using the same office, employing substantially the same personnel and equipment, and obtaining its material and supplies from the same suppliers as had Pioneer Constructors prior to November 1, 1956, such additional findings being material and being required by the undisputed evidence on these points.

4. The District Court erred in finding (R 70) that, on December 4, 1956, in the expectation that the (termination of)



Pioneer Constructors' subcontract and the entry of Construction Materials Company into a subcontract would soon thereafter be formally accomplished, Construction Materials Company caused Apache Powder Company to be notified that all materials thereafter supplied or delivered by Apache Powder Company to the aforesaid job were to be billed to Construction Materials Company, without at the same time finding that such notification was given by the person who previously had ordered the material for the Ajo job as an employee of Pioneer Constructors, that such person did not notify Apache Powder Company that he then was an employee of Construction Materials Company, and that such person then voluntarily stated that Construction Materials Company was a division of Pioneer Constructors, such additional findings being material and being required by the undisputed evidence on these points.

5. The District Court erred in finding (R 71) that after December 4, 1956, and not later than January 8, 1957, Apache Powder Company had knowledge and information which would have led a reasonably prudent person in the same situation to make an investigation of the subcontract situation on the Ajo job and the relation of Pioneer Constructors and Construction Materials Company thereto, for the reason that Pioneer Constructors' subcontract had not been terminated on December 4, 1956, and was not terminated until January 8, 1957, and Apache Powder Company had no notice or knowledge until March 19, 1957, that Pioneer Constructors' subcontract had been terminated, and such findings are not supported by the evidence and are contrary thereto.

6. The District Court erred in finding (R 72) that Apache Powder Company failed to make any reasonable effort under the circumstances to ascertain the facts regarding the subcontract situation and the relationship of Pioneer Constructors and Construction Materials Company thereto, and that Apache Powder Company did not act with ordinary prudence in protecting its rights as against the prime contractor and its surety, for the rea-

son that such findings are not supported by the evidence and are contrary thereto.

7. The District Court erred in concluding (R 74) that the written notice given by Apache Powder Company to Ashton-Mardian Company on April 25, 1957, did not comply with the requirements of Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a), for the reason that Apache Powder Company could not be charged with notice or knowledge until March 19, 1957, of the termination of Pioneer Constructors' subcontract; written notice was given by Apache Powder Company to the prime contractor within ninety days after Apache Powder Company furnished the last of the material on the Ajo job, March 12, 1957, and the District Court's conclusion is therefore not supported by the law and the evidence and is contrary thereto.

8. The District Court erred in concluding (R 66) that the oral notice given by Apache Powder Company to Ashton-Mardian Company, the prime contractor, on March 19, 1957, given within ninety days from December 20, 1956, on which date Apache Powder Company furnished the last of the materials on the Ajo job prior to January 8, 1957, when Pioneer Constructors' subcontract was terminated, did not comply with the requirements of Act of Congress of August 24, 1935, c. 642, §2, 49 Stat. 794, 40 U.S.C.A. § 270b(a), for the reason that said oral notice did comply with the requirements of said Act of Congress, and said conclusion is not supported by the law and the evidence and is contrary thereto.

9. The District Court erred in concluding (R 74) that Apache Powder Company is not entitled to judgment against the defendants, The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in joint venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, or any of them, under the first count of the amended



complaint, and that said defendants are entitled to judgment against Apache Powder Company for their costs of suit, for the reason that such conclusions are not supported by the law and the evidence and are contrary thereto.

10. The District Court erred in ordering, adjudging, and decreeing (R 77) that the defendants, The Ashton Company, Inc., Contractors and Engineers, formerly Ashton Building Company, and Mardian Construction Company, corporations engaged in joint venture as Ashton-Mardian Company, and The Travelers Indemnity Company, a corporation, have judgment against Apache Powder Company on the first count of the amended complaint, and that Apache Powder Company take nothing by said first count of the amended complaint from said defendants, or any of them, and that said defendants have their costs of suit, for the reason that such judgments are not supported by the law and the evidence and are contrary thereto.

### **SUMMARY OF ARGUMENTS**

1. Apache Powder Company furnished material which was used on the Ajo job in the prosecution of the work specified in the prime contract and in the subcontract, the last of the material was furnished on March 12, 1957, Apache Powder Company served written notice of its claim on the prime contractor on April 25, 1957, within ninety days after it furnished the last of the material, said claim being for the balance of the amount due on said material, and Apache Powder Company is entitled, under the provisions of the Miller Act, to judgment against the prime contractor and its surety on the prime contractor's payment bond.

2. Apache Powder Company had no actual notice or knowledge of the changes in subcontracts and subcontractors until March 19, 1957, and the facts and circumstances relating to the subcontracts, to the performance of the work under the subcontracts, and to the changes of subcontracts and subcontractors, were

such that they did not give Apache Powder Company any reason to believe there were any such changes.

3. Apache Powder Company had no actual notice or knowledge of the changes in subcontracts and subcontractors until March 19, 1957, and the information it received and the information allegedly given to it by Construction Materials Company employees was not sufficient to charge Apache Powder Company with notice or knowledge of such changes.

4. Even if, from the information received by and allegedly given to Apache Powder Company, a duty was imposed upon it to make an investigation, its periodic investigations of the situation at Ajo satisfied the requirements of that duty, and Apache Powder Company's actions under the circumstances were reasonable.

5. The Miller Act should be liberally construed to effectuate its purpose, being a remedial act intended to benefit persons who perform labor or furnish material for contractors on public work, and in the interpretation of the act the intention of the Congress to protect those who furnish materials for public buildings and to insure the payment in full for such material should prevail even against the letter of the act.

6. In any event, Pioneer Constructors' subcontract was terminated on January 8, 1957, and Apache Powder Company had delivered material on the Ajo job on December 20, 1956. The oral notice to Ashton-Mardian Company of Apache Powder Company's claim against Pioneer Constructors and Construction Materials Company made on March 19, 1957, was made within ninety days after the delivery of December 20, 1956, and was sufficient notice under the Miller Act.

## ARGUMENTS

### I

This argument relates to Question 1 and Specifications of Error 2, 7, 9, and 10.

Apache Powder Company furnished material which was used on the Ajo job in the prosecution of the work specified in the prime contract and in the subcontract, the last of the material was furnished on March 12, 1957, Apache Powder Company served written notice of its claim on the prime contractor on April 25, 1957, within ninety days after it furnished the last of the material, said claim being for the balance of the amount due on said material, and Apache Powder Company is entitled, under the provisions of the Miller Act, to judgment against the prime contractor and its surety on the prime contractor's payment bond.

The Act of Congress of August 24, 1935, c. 642, § 2, 49 Stat. 794, 40 U.S.C.A. § 270b(a), see Appendix 51, provides for suit for the amount due for material, or *the balance of the amount due*, under two situations. The first is where the supplier has direct contractual relationship, express or implied, with the prime contractor. The second is where the supplier has direct contractual relationship with a subcontractor, but none with the prime contractor. In the latter case, it is required that the supplier give notice of his claim against the subcontractor to the prime contractor, within ninety days from the date on which said supplier *furnished the last of the material for which the claim is made*.

Apache Powder Company's claim is for the balance due for material furnished on the Ajo job from June 13, 1956, to March 12, 1957. All the material was covered by factory orders and invoices addressed and mailed to Pioneer Constructors, all the material was shipped to and receipted for in the name of Pioneer Constructors (R 191, 192) (Plaintiff Apache's exhibits 3 and 4 in evidence), and all the material was charged to Pioneer Constructors and the monthly statements mailed to Pioneer Constructors (R 197).

The payments made by Construction Materials Company were made on Pioneer Constructors' account with Apache Powder Company. Apache Powder Company applied these payments, and the credit memoranda issued to Pioneer Constructors, on Pioneer

Constructors' account for all the material furnished on the Ajo job. There always was a balance due on the Pioneer Constructors' account which, prior to the first payment by Construction Materials Company, amounted to \$29,041.50, being the \$20,900.39 for material furnished prior to November 1, 1956, and \$8,141.11 for material furnished during November and December, 1956. This balance thereafter was reduced by the payments made by Construction Materials Company and the credit memoranda issued to Pioneer Constructors (R 206) to the \$18,947.96 for which judgment was sought (R 33, 52).

The application of the payments made by Construction Materials Company, and the credit memoranda issued to Pioneer Constructors, to Pioneer Constructors' account, and the current balances due on the account, were shown on the monthly statements (R 197, 198). Neither Pioneer Constructors nor Construction Materials Company objected to these applications and balances, and neither claimed that the Construction Materials Company payments should be applied to the payment for the materials furnished after November 1, 1956 (R 197, 208).

Thus the written notice of claim was for the balance due for materials for which the claim is made, and the material furnished on March 12, 1957, was the last and part of the material for which claim is made.

The plain and simple language of the act authorizes and requires judgment against the prime contractor and its surety on the prime contractor's payment bond. Any other interpretation would require that the language of the act be altered and that some additional language be read into the act.

## II

This argument relates to Question 1 and Specifications of Error 3, 9, and 10.

Apache Powder Company had no actual notice or knowledge of the changes in subcontracts and subcontractors until March 19,



1957, and the facts and circumstances relating to the subcontracts, to the performance of the work under the subcontracts, and to the changes of subcontracts and subcontractors, were such that they did not give Apache Powder Company any reason to believe there were any such changes.

In Section 1 on both of the subcontracts, detailing the parts of the work specified in the prime contract which were to be done by the subcontractor, the work specified to be performed is identical (R 116, 118). See Appendix 53, 56.

The supplement sheets attached to the subcontracts show that the items to be performed are identical, except Item 30 which had been completed by Pioneer Constructors, and the unit prices are identical, the differences shown being in the quantities to be performed or supplied, the extensions of the amounts, and the total (R 128). See Appendix 55, 58.

Pioneer Constructors' subcontract is No. 7 and Construction Materials Company's subcontract is No. 128, but the supplement sheet attached to the Construction Materials Company subcontract is entitled "Supplemental Sheet to Subcontract No. 7" (R 119). See Appendix 58.

The Pioneer Constructors' subcontract is for \$401,217.38 and the Construction Materials Company subcontract is for \$266,391.36, which was estimated as of October 31, 1956, to be the amount of work remaining to be performed (R 120, 131).

By their actions and the conditions imposed, Pioneer Constructors, Construction Materials Company, and Ashton-Mardian Company treated the two subcontracts as one.

When, during the latter part of November, 1956 (R 112), Pioneer Constructors, Construction Materials Company, and Ashton-Mardian Company agreed that Construction Materials Company would take over the subcontract of Pioneer Constructors on the Ajo job as of November 1, 1956 (R 112, 117), J. E. Skorpick and Thomas E. Moore represented both the subcontract-

tors. And Ashton-Mardian Company made two conditions. Construction Materials Company had previously been engaged in the construction materials business, and had done no construction work (R 257), and Ashton-Mardian Company required that the work proceed under the same management, and with same personnel and equipment as under the Pioneer Constructors' subcontract (R 132). The second condition was that Construction Materials Company execute and deliver to Ashton-Mardian Company a new subcontractor's bond, with acceptable surety, preferably the same as the surety on the Pioneer Constructors' bond, for performance and payment under Construction Materials Company's subcontract (R 123).

After the agreement between the three companies, a subcontract (Plaintiff Armco's exhibit 7 in evidence) from Ashton-Mardian Company to Construction Materials Company was prepared, dated November 1, 1956, and signed by Construction Materials Company, but not executed and delivered by Ashton-Mardian Company until January 8, 1957 (R 124, 125) when Construction Materials Company's subcontractor's bond was executed and delivered to Ashton-Mardian Company. The subcontract to Pioneer Constructors was terminated at the same time (R 125).

Furthermore, even before J. E. Skorpick and Thomas E. Moore, representing Construction Materials Company, approached Harold Ashton in the last half of November, 1956, for a new subcontract to Construction Materials Company (R 112), Construction Materials Company, beginning on November 4, 1956, took over the payroll (R 158), and the work specified in the Pioneer Constructors' subcontract which had not then been completed (R 120). And, during the period from November 4, 1956, to January 8, 1957, Ashton-Mardian Company held Pioneer Constructors liable and responsible on its subcontract and bond, and Ashton-Mardian Company made no payments to Construction Materials Company until after the new bond was furnished (R 125, 126).



The United States project engineer was never officially notified that Construction Materials Company was a subcontractor (R 99).

As required by Ashton-Mardian Company (R 132), Construction Materials Company, in completing the work originally specified in the Pioneer Constructors' subcontract, used the same offices as Pioneer Constructors (R 149), operated under the same management, took over the payroll (R 158) and employed substantially the same personnel, and used substantially the same equipment (R 120). There was no interruption in the work schedule (R 199). The name of Pioneer Constructors was on some of the equipment used on the Ajo job, and the name of Construction Materials Company did not appear on any of the equipment until after the first of the year 1957 (R 121, 122).

There was no change in the work to be performed for which Apache Powder Company was furnishing the explosives and blasting supplies, and there was no change in the performance of the work with respect to management, personnel, equipment, suppliers, or work schedule. There was no change-over, either on November 1, 1956, November 4, 1956, or January 8, 1957, which ordinarily would have occurred upon a change of subcontracts and subcontractors, with the old management, personnel, and equipment moving out and the new moving in, and new arrangements with the suppliers, to give Apache Powder Company any reason to believe there were any such changes.

### III

This argument relates to Question 1 and Specifications of Error 2, 3, 4, 5, 6, 7, 9, and 10.

Apache Powder Company had no actual notice or knowledge of the changes in subcontracts and subcontractors until March 19, 1957, and the information it received and the information allegedly given to it by Construction Materials Company employees was not sufficient to charge Apache Powder Company with notice or knowledge of such changes.

There is no evidence that Apache Powder Company received or was given any information of any change in the situation until the phone call from Paul A. Swagerty on December 4, 1956.

With respect to that phone conversation, Paul Negley testified that Paul A. Swagerty, who was known as an employee of Pioneer Constructors, gave him an order for material, informed him that the balance of the materials for the Ajo job should be billed to Construction Materials Company, Construction Division, Tucson, Arizona, and that Construction Materials Company, Construction Division, was a division of Pioneer Constructors. Paul Negley made a pencilled notation of the order and these statements by Paul A. Swagerty, and stated that he is positive that Paul A. Swagerty said that Construction Materials Company, Construction Division, was a division of Pioneer Constructors (R 240, 241, 243).

The testimony of Paul A. Swagerty with respect to the telephone conversation of December 4, 1956, in substance is that he told Paul Negley that future billings with regard to the Ajo work should be billed to Construction Materials, Construction Division, and thinks he told him in answer to a question about an address that he could forward the statements to the same place he had previous ones, and that Melvin J. Simmons would take care of them (R 252). Paul A. Swagerty said he did not recall anything being said as to the status of Construction Materials Company, whether it was or was not a division of Pioneer Constructors, and to the best of his knowledge he had not made such a statement to Paul Negley or anyone else, because he didn't know what affiliates the firm had (R 252). However, there is no evidence that Paul A. Swagerty made or referred to any written memorandum of the conversation, and on cross examination said he did not deny that he told Paul Negley that Construction Materials Company, Construction Division, was a division of Pioneer Constructors (R 253, 254). The only time Paul A. Swagerty said anything about billing to Construction Materials Company was in this telephone conversation of December 4, 1956 (R 255), and

the most he told Paul Negley at that time was that shipments to Ajo should be billed to Construction Materials Company, Construction Division (R 259).

Immediately after this telephone conversation of December 4, 1956, with Paul A. Swagerty, Paul Negley reported it to J. L. Schmalzel, his immediate superior (R 238), and it then was reported to R. L. Henderson, the general manager of Apache Powder Company (R 211). The information received was considered, and thereafter Apache Powder Company continued to bill and ship the material to Pioneer Constructors (R 212, 213).

R. L. Henderson gave as the reasons for this action (R 213) that the arrangements for supplying explosives and loaning magazines had been made with Pioneer Constructors, the subcontractor on the job; Apache Powder had no notice that the subcontract with Pioneer Constructors had been terminated; and Apache Powder Company had not been approached by Construction Materials Company, and had no arrangements with it for sale or delivery of explosives or loan of magazines. Furthermore, in view of the information that Construction Materials Company, Construction Division, was a division of Pioneers Constructors, R. L. Henderson thought it natural to assume (R 235) that Apache Powder Company was still doing business with Pioneer Constructors.

Appellant, under the above-mentioned circumstances, contends that Apache Powder Company's action in continuing to bill Pioneer Constructors was consistent with the information it had received, and that it was reasonable and proper for Apache Powder Company to continue to bill the principal or parent company, in the absence of any further information or notice, having made its arrangements with and having its account with the principal or parent company.

Thereafter the investigations in the field disclosed that there had been no change in the management, personnel, equipment, or work schedule on the job at Ajo, and none of the factory orders



and invoices made out to and mailed to Pioneer Constructors was returned for correction. The bills of lading were returned, receipted for in the name of Pioneer Constructors, and no further requests were made for billing to Construction Materials Company, Construction Division. Apache Powder Company assumed, and had a right to assume that it was still furnishing material to Pioneer Constructors under its subcontract.

Next in order of time is the purported call from Melvin J. Simmons on December 10, 1956, to Apache Powder Company. Later, when the testimony by Melvin J. Simmons in his deposition relating to this phone call was reported to Apache Powder Company, an investigation was made, and no one at Apache Powder Company was found who had received it or heard of it (R 218). And R. L. Henderson (R 217), and J. L. Schmalzel and Amos J. Browning, who would have received it if it had been made, each testified that he had received no such call (R 245, 246).

Melvin J. Simmons testified (R 179) that he didn't know whether he called the purchasing department or the accounting department at Apache Powder Company, that he did not ask the name of the person with whom he talked or his capacity with the company, and when first questioned about the call (R 178) said he did not recall the date, but thought it was in the latter part of January or February, 1957, and may have been later than that. When he was reminded that in his deposition he had fixed the date as December 10, 1956, he said that was the date. However, there is testimony by both participants (R 105, 171) of a call on December 10, 1956, between Gerald John Sturm of Armco Drainage & Metal Products Company and Melvin J. Simmons on a very similar subject, and Melvin J. Simmons may have been thinking of that call. Moreover, in connection with that conversation, Gerald John Sturm denied that Melvin J. Simmons had said that Construction Materials Company had taken over the job and at that time was subcontractor on the job and that Pioneer Constructors were no longer on the job.



Whether or not Melvin J. Simmons did call Apache Powder Company on or about December 10, 1956, the most that he claims is that he requested that future orders be billed to Construction Materials Company, because it was doing the work. This would have been consistent with Paul A. Swagerty's statement on December 4, 1956, and would have provided no further information or notice to Apache Powder Company of any change in the subcontracts and subcontractors.

Then, on December 29, 1956, Apache Powder Company received the first check, dated December 27, 1956, from Construction Materials Co., Construction Division, Tucson, Arizona. This check for \$4,723.37 had a remittance slip attached (Plaintiff Apache's exhibit 11-A in evidence) stating "Billed to Pioneer Const., Inv. 42088, 42175, 42245."

Apache Powder Company considered the receipt of this check, and decided it was all right to accept the payment and apply it on the Pioneer Constructors' account (R 214). The invoices listed on the remittance slip were for the material ordered for, billed and shipped to, and receipted for in the name of Pioneer Constructors during the month of November, 1956, before Paul A. Swagerty's phone call on December 4, 1956, requesting that future billings be made to Construction Materials Company, Construction Division. Apache Powder Company had been informed that Construction Materials Company, Construction Division, was a division of Pioneer Constructors, and the only account it had on the Ajo job was with Pioneer Constructors (R 214, 215). Continued periodic investigations at Ajo resulted in reports that there were no unusual circumstances in connection with the work, and the work was progressing without any interruption in the schedule, and without any change in management, personnel, or equipment (R 215). The request it had received on December 4, 1956, regarding billing to Construction Materials, related only to future billings.

The significance of the facts and circumstances surrounding

this first payment is of great importance. It was a payment on the Pioneer Constructors' account, made by a company which Apache Powder Company had been informed was a division of Pioneer Constructors, listing invoices for material which to that time without question had been ordered by Pioneer Constructors, the principal or parent company, and had been billed and shipped to and receipted for in the name of Pioneer Constructors. Apache Powder Company had not then been informed that Construction Materials Company had taken over the work as of November 1, 1956, and could not have known that the payment was for material Construction Materials Company had used after it took over the work. It was a payment of the current items on the statement for the month of November, the last statement previously issued by Apache Powder Company to Pioneer Constructors. If the first payment made by Construction Materials Company had related to invoices for material ordered on and after December 4, 1956, for which billings to Construction Materials Company had been requested, its significance would have been materially different. As it was, the payment merely meant that the division of Pioneer Constructors that had taken over the work on December 4, 1956, was beginning to make payments on the Pioneer Constructors' account, and had made its first payment to cover the current items of the last monthly statement received.

This certainly was no information charging Apache Powder Company with notice or knowledge that Pioneer Constructors' subcontract had been terminated, and that a new subcontract had been given to a new, different, and independent subcontractor who was not responsible or liable for the payment of the Pioneer Constructors' account for material furnished prior to November 1, 1956. On the contrary, it was information that Construction Materials Company was beginning to pay Pioneer Constructors' account, and had begun by making a payment on the old account.

The evidence is undisputed that Apache Powder Company had no actual notice or knowledge, at the time of the occurrences, of Construction Materials Company taking over the work on Novem-

ber, 4, 1956, as an independent subcontractor or otherwise, of the later negotiations in the latter part of November, 1956, by Pioneer Constructors and Construction Materials with Ashton-Mardian Company for a new subcontract to Construction Materials Company, or of the termination of the Pioneer Constructors' subcontract and the execution of the Construction Materials Company's subcontract on January 8, 1957.

Thus, the next information Apache Powder Company received was as a result of the payment of the second check by Construction Materials Co., Construction Division, dated February 10, 1957, and received on February 13, 1957. This check for \$3,417.74 had a remittance slip attached (Plaintiff Apache's exhibit 11-B in evidence) stating: "covers the following Invoices 42291, 42308, 42406, Billerd to pioneer." The three invoices listed are for the material furnished in December, 1956. This payment was credited by Apache Powder Company on the Pioneer Constructors' account (R 221).

The three invoices listed were on orders made on or after December 4, 1956, when Paul A. Swagerty requested a change in the billing, but the material had been billed and shipped to, and receipted for in the name of Pioneer Constructors (Plaintiff Apache's exhibits 3 and 4 in evidence). None of the factory orders and invoices issued on or after December 4, 1956, had been returned for correction, no objection had been made to the continued billing to Pioneer Constructors, and no further requests for a change in billing had been received. This second check was a payment of the current items on the monthly statement for December, 1956, which showed the application of the first payment to the Pioneer Constructors' account, and no objection was made thereto. And inspections of the work at Ajo continued to show that the work was progressing under the same management, and with substantially the same personnel and equipment.

This was the second payment by Construction Materials Co., Construction Division, on the Pioneers Constructors' account, and



the listing of invoices to Pioneer Constructors had no more significance than the listing of the invoices on the remittance slip attached to the first check. In that instance, the invoices were for material which to that time without question had been ordered by Pioneer Constructors, the principal or parent company, and had been billed and shipped to, and receipted for in the name of Pioneer Constructors. In this instance, the invoices were for material ordered by a division of Pioneer Constructors apparently for use under the principal or parent company's subcontract, which had been billed and shipped to, and receipted for in the name of the principal or parent company. It was just another payment by the division on the account of the principal or parent company.

Under these circumstances, this was no information charging Apache Powder Company with notice or knowledge that Pioneer Constructors' subcontract had been terminated, and that a new subcontract had been given to a new, different, and independent subcontractor who was not responsible or liable for the payment of the Pioneer Constructors' account for material furnished prior to November 1, 1956. On the contrary, it was information that this division of the parent or principal company was continuing to pay Pioneer Constructors' account.

Before the third check was received on April 11, 1957, by Apache Powder Company from Construction Materials Co., Construction Division, the last of the material had been furnished on March 12, 1957, and Apache Powder Company on March 19, 1957, had learned of the termination of the Pioneer Constructors' subcontract and the execution of the Construction Materials Company's subcontract, so that the receipt of the third check could have had no significance with respect to charging Apache Powder Company with notice or knowledge of the changes in subcontracts and subcontractors.

Another point, which was brought out in the cross examination of R. L. Henderson as the general manager of Apache Powder Company, is that Pioneer Constructors had made no payments for



the material furnished prior to November 1, 1956 (R 220), and that the payments received were made by Construction Materials Co., Construction Division.

R. L. Henderson said that he was aware of the situation (R 224), and had given consideration to it (R 228). It was not the policy of Apache Powder Company to let accounts run without payments for several months, but it was not unusual with this type of work with contractors (R 228, 229). The company didn't like to go to the prime contractor and embarrass the subcontractor, if it could be avoided. It had men in the field who watched the jobs, and they reported nothing unusual. It relied on the payment bond of the prime contractor in all cases of contract work. (R 229) There is a competitive angle in the industry, and it is customary to go along with the contractors who do not pay regularly. If Apache Powder Company were to be too rigid and inflexible, it would lose a lot of business because its competitors will be liberal and in many cases more liberal (R 231).

Also on cross examination, R. L. Henderson was asked whether it raised any question in his mind and that of the company (R 230) "when you have an account that is six months old without any payment and then out of a clear blue sky you start getting checks from another organization, so far as the checks themselves show, in payment of the (198) last invoices?" R. L. Henderson replied that this was noted, and that it was the reason Apache Powder Company gave consideration to its course. The information from the field in regard to the job, and the experience with Pioneer Constructors, the subcontractor, was reviewed (R 230). The company's experience with Pioneer Constructors had been very good before, at that point Apache Powder Company could well believe it was going to be paid, and in addition it had confidence in the prime contractor, and did not go to the prime contractor.

An attempt was made to show that Apache Powder Company had credited the individual invoices listed by Construction Materials Company on the remittance slips attached to the checks,

because they were checked off on a statement supplied by Apache Powder Company (Defendant Ashton's exhibit A in evidence), but (R 221) there was no evidence as to who had checked off the individual invoices on the statement, and R. L. Henderson testified (R 221) that the money received from Construction Materials Company on its checks for Pioneer Constructors' material was applied against the entire balance of Pioneer Constructors' account.

In the consideration of the question as to whether Apache Powder Company received any information with which it should be charged with notice or knowledge of the change in subcontracts and subcontractors, it is very apparent that the statement from Paul A. Swagerty that Construction Materials Company, Construction Division, was a division of Pioneer Constructors, is the crux of the entire situation.

Appellant's contention that this statement was made, was immediately reported to the officials of Apache Powder Company, and given careful consideration by them, is supported by positive and undisputed evidence.

And appellant's contention that this statement was considered in connection with all the other information received by Apache Powder Company prior to March 19, 1957, also is supported by positive and undisputed evidence.

Apache Powder Company gave careful consideration to all the information it received, all the conditions and occurrences reported to it. It believed and had a right to believe, in view of all the circumstances, that Construction Materials Company, Construction Division, was a division of Pioneer Constructors. All the information Apache Powder Company received was consistent with the information that Construction Materials Company, Construction Division, was a division of Pioneer Constructors. And all of Construction Materials Company's actions known to Apache Powder Company, and all of Apache Powder Company's actions were consistent with that information.

In connection with the information that it was a division of Pioneer Constructors, the very name, Construction Materials Company, Construction Division, indicated that the organization was a division of some larger organization, and all of its actions known to Apache Powder Company indicated that the larger organization was Pioneer Constructors, in whose name it was acting.

Emphasis was given to the fact that Apache Powder Company did not go to the officials of Pioneer Constructors, Construction Materials Company, or Ashton-Mardian Company and inquire as to the subcontract situation, and that if it had Apache Powder Company would have learned of the true subcontract situation. Apache Powder Company considered doing this, and gave good reason for not doing it.

Obviously, if Apache Powder Company had been informed that Pioneer Constructors' subcontract had been terminated, and a new subcontract given to Construction Materials Company as a new, different, and independent subcontractor, it would have taken further action. There is no evidence, however, that Apache Powder had such notice or knowledge prior to March 19, 1957, and the testimony of Apache Powder Company witnesses is positive and undisputed that it did not have such notice or knowledge prior to that time.

The District Court applied the rule that a person is charged with notice or knowledge of a fact if he had knowledge or information which would have led a reasonably prudent person in the same situation to make an investigation to ascertain the facts in regard to the situation. This is a well-recognized general rule, which appellant did not and now does not contend is not applicable. In imposing the duty to inquire, however, the District Court erred in determining what knowledge or information Apache Powder Company had and what duty was imposed upon it.

In 66 C.J.S., *Notice*, § 11b(4) (b), at page 646, the following limitation on the general rule is stated as follows:

" \* \* \* in order to charge a person with notice of a fact which could have been ascertained by inquiry, the circumstances known to him must have been such as ought reasonably to have suggested inquiry and led him to inquire. The rule imputes notice only of those facts that are naturally and reasonably connected with the fact known, and of which the known fact or facts can be said to furnish a clue. \* \* \*

"Where the circumstances relied on as sufficient to charge a party with notice may be equally as well referred to a different matter as to the one with notice of which he is sought to be charged, they will not be deemed to be sufficient."

In *National Shawmut Bank of Boston v. Topas*, C.C.A. Mass., 60 F.2 467, certiorari denied *Topas v. National Shawmut Bank of Boston*, 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576, it is held that knowledge of facts putting creditor on inquiry as to whether preference would result from accepting funds from insolvent debtor is not necessarily sufficient to put him on inquiry as to debtor's wrongful appropriation of funds to pay loan.

The only knowledge or information that Apache Powder Company had was that Construction Materials Company, Construction Division, had taken over the work at Ajo, that it requested that future billings be made to it, that it was a division of Pioneer Constructors, and that it was making payments on Pioneer Constructors' invoices and account. And, as previously pointed out in detail, everything, including the actions and lack of protest by Construction Materials Company, was consistent with this information.

This knowledge or information did not suggest an inquiry as to the subcontract situation at Ajo and the relation of Pioneer Constructors and Construction Materials Company thereto, because there was nothing inconsistent, and no question was raised as to whether or not Construction Materials Company, Construction Division, had taken over the work, or was a division of Pioneer Constructors. If Construction Materials Company had sent back the factory orders, invoices, or monthly statements for correction, had



used its name in receipting for the material, had protested the application of its first payment to the Pioneer Constructors' account, or had called or written and made some complaint, a question would have been raised, but it did not.

The District Court in finding that there was a duty imposed upon Apache Powder Company of investigating the subcontract situation on the Ajo job, must have found that Apache Powder Company was not informed that Construction Materials Company, Construction Division, was a division of Pioneer Constructors, or must have found that Apache Powder Company had knowledge or information that there had been a change in subcontracts and subcontractors. If it did so find, the findings were not supported by the evidence and are contrary thereto.

For the sake of brevity, appellant will not here repeat its Specifications of Error 2, 3, 4, 5, 6, 7, 9, and 10, relating, respectively, to Findings of Fact No. 7 (R 69), No. 10 (R 69), No. 12 (R 70), No. 16 (R 71), No. 17 (R 72), Conclusions of Law No. 3 (R 74), No. 5 (R 74), and Order (R 77), but hereby specifically refers to them and incorporates them as a part of this argument, and asks that they be considered in the light of the foregoing statements of fact and arguments.

As shown by these findings, conclusions, orders, and judgment, it is apparent that the District Court failed to consider all the facts and circumstances, or failed to consider them in their proper relation to each other, and particularly failed to consider the progressive development of the situation step by step, relating each item of information to the situation then existing, and relating successive items of information and the situation then existing to the previous ones.

Thus, the knowledge or information relied on as sufficient to charge Apache Powder Company with notice of the changes in subcontracts and subcontractors was not sufficient in fact or in law.

## IV

This argument relates to Question 1 and Specifications of Error 2, 3, 4, 5, 6, 7, 9, and 10.

Even if, from the information received by and allegedly given to Apache Powder Company, a duty was imposed upon it to make an investigation, its periodic investigations of the situation at Ajo satisfied the requirements of that duty, and Apache Powder Company's actions under the circumstances were reasonable.

As pointed out in Argument III, the only knowledge or information that Apache Powder Company had was that Construction Materials Company, Construction Division, had taken over the work at Ajo, that it had requested that future billings be made to it, that it was a division of Pioneer Constructors, and that it was making payments on Pioneer Constructors' invoices and account.

If any duty was imposed upon Apache Powder Company to make an investigation, it related only to the questions as to whether Construction Materials Company, Construction Division, had taken over the work at Ajo, and whether it was a division of Pioneer Constructors, in order to determine whether this information given to it by Paul A. Swagerty was accurate.

Without repeating the statements and arguments contained in Argument III, but hereby specifically referring to them and incorporating them herein, appellant again contends that the continuing, unchanging situation at Ajo, disclosed by the periodic investigations all through the period in question, wherein there was no change in the management, personnel, equipment, character of work, and extent of work being performed, and no interruptions in the work schedule, was entirely consistent with the statements made by Paul A. Swagerty, and that nothing occurred of an unusual nature which raised any further questions.

In connection with these facts and circumstances, appellant again contends that the actions of Construction Materials Company, in continuing to receipt for the material in the name of Pio-

neer Constructors, in failing to make any objections to the factory orders, invoices, bills of lading, and monthly statements, in making payments on the Pioneer Constructors' account, and in failing to object to the application of those payments, all also are entirely consistent with the statements made by Paul A. Swagerty, and nothing further occurred in connection with these matters of an unusual nature which raised any further questions.

And it should be stressed again, that these investigations, checking bills of lading, and noting failures to object, were active, considered actions by Apache Powder Company in the light of Paul A. Swagerty's statements.

Apache Powder Company contends that, under all the circumstances, it acted in a reasonable and prudent manner, that it did not fail to make a reasonable effort to ascertain the facts, and that it did act with ordinary prudence in protecting its rights. The only thing it did not do, which it is contended it should have done, was go to the officials of the subcontractors and prime contractors. This was considered but was not done because of the competitive situation, because Apache Powder Company did not want to embarrass the subcontractor, if it could be avoided. And, in this connection, it is of the greatest importance to remember that Apache Powder Company was closely watching the progress of the work, the work was not completed, the last of the material was not furnished until March 12, 1957, and *there was no need or purpose until that time to protect its rights against the prime contractor.*

## V

This argument relates to all the questions and specifications of error, and to the whole case generally.

The Miller Act should be liberally construed to effectuate its purpose, being a remedial act intended to benefit persons who perform labor or furnish material for contractors on public work, and in the interpretation of the act the intention of the Congress to protect those who furnish materials for public buildings and to

insure the payment in full for such material should prevail even against the letter of the act.

A search of the cases decided under the Miller Act fails to disclose any case similar to this, where there was a change in subcontractors and part of the work is done by one subcontractor and the remainder of the work is done by another.

However, the Supreme Court of the United States has consistently ruled that the act should be liberally construed.

In *Fleisher Engineering & Construction Co. v. U.S. For Use and Benefit of Hallenbeck*, N.Y. 1940, 61 S.Ct. 81, 311 U.S. 15, 85 L.Ed. 12, 14, Mr. Chief Justice Hughes said:

"In construing the earlier Act, the Heard Act, for which the Miller Act is a substitute, we observed that it was intended to be highly remedial and should be construed liberally. United States use of Alexander Bryant Co. v. New York Steam Fitting Co., 235 US 327, 337, 59 L ed 253, 257, 35 S Ct 108; Illinois Surety Co. v. John Davis Co., 244 US 376, 380, 61 L ed 1206, 1211, 37 S Ct 614; Fleischmann Constr. Co. v. United States, 270 US 349, 360, 70 L ed 624, 631, 46 S Ct 284. \* \* \* In short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose. 'Technical rules otherwise protecting sureties from liability have never been applied in proceedings under this statute.' Illinois Surety Co. v. John Davis Co., 244 US 376, 61 L ed 1206, 37 S Ct 614, supra. The same principle should govern the application of the Miller Act."

And in *Liebman v. U.S. for Use of California Electric Supply Co.*, C.C.A. 9th Cir. 1946, 153 F.2d 350, 352, the Court said:

" \* \* \* The purpose of the Miller Act is to protect those who furnish materials or labor or both for public buildings and to insure the payment in full for such materials and labor. \* \* \* "

In *Hawaii v. Mankichi*, 190 U.S. 197, 213, 23 S.Ct. 787, 47 L.Ed. 1016, 1021, Mr. Justice Brown said:

" \* \* \* But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What



was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authority to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice Swayne in *Smith v. Fiske*, 23 Wall. 374, 380, 23 L.ed. 47, 49: 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Chief Justice Thompson of the supreme court of the state of New York (subsequently Mr. Justice Thompson of this court), in *People v. Utica Ins. Co.*, 15 Johns. 358, 381, 8 Am. Dec. 243: 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.' "

## VI

This argument relates to Question 2 and Specifications of Error 1, 8, 9, and 10.

In any event, Pioneer Constructors' subcontract was not terminated until January 8, 1957, and Apache Powder Company had delivered material on the Ajo job on December 20, 1956. The oral notice to Ashton-Mardian Company of Apache Powder Company's claim against Pioneer Constructors and Construction Materials Company made on March 19, 1957, was made within ninety days after the delivery of December 20, 1956, and with the writing evidencing the receipt of the oral notice was sufficient notice under the Miller Act.

Oral notice to Harold Ashton of Ashton Building Company is shown in his testimony (R 136), which is detailed in the Statement of the Case, and oral notice to Daniel Mardian of Mardian Construction Company is shown in his letter to Harold Ashton of March 19, 1957 (Plaintiff Apache's exhibit 1 in evidence).

The contents of these notices satisfy the requirements of § 270b(a) of the Miller Act, which requires the making of a

claim, "stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied".

Plaintiff Apache's exhibit 1 in evidence is written unquestioned evidence of receipt of the oral notice by the prime contractor.

With respect to the provision of § 270b(a) of the Miller Act, which requires that written notice of the claim must be sent by registered mail, the courts, giving a liberal construction to the act, held that the notice need not be sent by registered mail. In *Fleisher Engineering & Construction Co. v. U.S. For Use and Benefit of Hallenbeck*, NY. 1940, 61 S.Ct. 81, 311 U.S. 15, 85, L.Ed. 12, 15, Mr. Chief Justice Hughes said:

" \* \* \* Then the statute goes on to provide for the mode of service of the notice. 'Such notice shall be served by mailing the same by registered mail, postage prepaid,' or 'in any manner' in which the United States marshal 'is authorized by law to serve summons.' We think that the purpose of this provision as to manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required notice within the specified time had actually been given and received. *In the face of such receipt, the reason for a particular mode of service fails. It is not reasonable to suppose that Congress intended to insist upon an idle form. Rather, we think that Congress intended to provide a method which would afford sufficient proof of service when receipt of the required written notice was not shown.*" (Underscoring added.)

In *Coffee et al. v. United States, for Use and Benefit of Gordon*, C.C.A. 5th Cir. 1946, 157 F.2d 968, 969, where no written notice was mailed to the prime contractor, but the materialman exhibited to the prime contractor as notice of his claim a writing showing the amount claimed and the identity of the subcontractor, the Court said:

" \* \* \* The Miller Act requires the notice by persons having no direct contractual relationship with the contractor, so that by delaying final settlement with his subcontractors for 90 days after completion of the work he may protect himself and his

bond against such unknown claims. *Written notice is required to prevent misunderstanding and to afford certain evidence of the communication.* The provisions of service afford means of making certain the fact of notice given, or of making a good service where the contractor can not be reached personally. (Underscoring added.)

“(1-3) All the cases agree that without giving the notice there is no right of action on the bond for the use of furnishers who have no direct contractual relation to the contractor. In no case has the writing been held unnecessary. But there has been liberality as to the manner of communicating the written notice to the contractor. We have held in *Birmingham Slag Co. v. Perry*, 5 Cir., 115 F.2d 724, that a letter from one who furnished materials to a subcontractor sent to the owner of the work, a copy of which was timely sent by the owner to the contractor by ordinary mail, was a good written notice. In *Fleisher E. & C. Co. v. United States*, 311 U.S. 15, 61 S.Ct. 81, 85 L.Ed 12, stress was laid on the remedial character of the Miller Act and its predecessor, and while written notice was apparently deemed necessary as a condition precedent to suit, nevertheless the fact that it was addressed to the project engineer and not served by any of the means mentioned in the statute was held immaterial since it in fact reached one of the two contractors. In *Glassell-Taylor Co. v. Magnolia Petroleum Co.*, 5 Cir., 153 F.2d 527, we again emphasized the liberal construction due to be given the Miller Act to effectuate the Congressional intent to protect those who furnish labor and material for public works. In the case now before us we hold that a writing containing the information which the statute requires, exhibited to the contractor by a claimant as a notice of his claim and which the contractor examines and discusses and might have taken if he desired, is a written notice sufficiently served. \* \* \*

The Honorable James A. Walsh, Judge of the District Court, who tried this case, in denying the motion to amend relating to oral notice, cited the case of *Bowden v. United States For the Use of Malloy*, C.C.A. 9th Cir., 1956, 239 F.2d 572, 577, the opinion of which he wrote (R 248). In this opinion, Judge Walsh said:

“We think the teaching of the cases which have dealt most soundly with questions regarding the sufficiency of the notice when it is required to be given by Section 270b(a) may be fairly



summarized as follows: The giving of the written notice specified by the statute is a condition precedent to the right of a supplier to sue on the payment bond; the writing must be sent or presented to the prime contractor by or on the authority of the supplier; and the writing must inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill."

However, this case dealt with an entirely different fact situation. There was no notice, oral or written, from the supplier to the prime contractor; the writing referred to having been sent by the subcontractor to the prime contractor. And nothing in the letter informed the prime contractor that the supplier expected the prime contractor to pay his bill. There was no written unquestioned evidence of the receipt of an oral notice by the prime contractor. And, in support of the above-quoted statement, Judge Walsh cites *Coffee et al. v. United States, for Use and Benefit of Gordon*, supra, which clearly supports appellant's position.

In *Houston Fire & Cas. Ins. Co. v. U.S. For the Use of Trane Company*, C.C.A. 5th Cir. 1954, 217 F.2d 727, 729, where there was an oral notice from the supplier to the prime contractor and a written acknowledgement by the prime contractor of the receipt of the notice, Chief Judge Hutcheson said:

"The appellee, on its part, citing the many cases in which the courts, construing the statute liberally to effect its purpose of protecting materialmen, have held that the statute is sufficiently complied with if the proof shows convincingly that knowledge is brought home to the principal contractor, urges upon us that, under the undisputed evidence, every essential requirement of the statute was met and fully complied with. Conceding that the statute was not literally complied with because plaintiff did not send a written notice by registered mail, indeed it did not send a written notice of any kind, it yet insists: that what occurred in connection with noticing the claim, plaintiff's oral notice to the principal contractor and a written acknowledgement of the request, and full recognition of Denton's indebtedness to Trane, and the fact that it had not been, but must be, paid was more effective than if a written notice had been sent by the materialmen and fully complied with the essential statu-



tory requirements of bringing home in writing to the principal contractor the requisite knowledge of the claim and debt.

"(1-2) We agree with appellee that this is so. It is true that the statute is carefully and meticulously phrased, and if this were a matter of first impressions, we might find difficulty in coming at once to the conclusion that what was done in this case was a sufficient compliance with it. However, the decisions under the statute, and particularly *Coffee v. United States, for Use and Benefit of Gordon*, supra, Note 4, have made it clear that it was. *It is not necessary that the writing relied on be signed by the supplier, it is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the nature and state of the indebtedness was brought home to the general contractor. When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with.*" (Underscoring supplied.)

The oral notice to the prime contractor and the written unquestioned evidence of the receipt of the oral notice by the prime contractor satisfy the requirements of the statute. The object of the notice is to assure that the prime contractor will have knowledge of the supplier's claim. The evidence is undisputed that as a result of the phone call on March 19, 1957, Ashton-Mardian Company had that knowledge. The purpose of a written notice is to afford certain evidence of the communication. This is afforded by the letter from Daniel Mardian to Harold Ashton. It is not necessary that the writing be signed by the supplier; it is sufficient if there exists a writing from which, in connection with the oral testimony, it plainly appears that the amount of the claim and the name of the person to whom the material was furnished is brought home to the prime contractor by the supplier.

Thus, every essential of the requirement of the statute has been met, and the District Court erred in denying the motion to amend to conform to the evidence, in concluding that the notice did not comply with the statute and Apache Powder Company is not entitled to judgment, and in ordering judgment in favor of the prime contractor and its surety.

## CONCLUSION

Appellant respectfully submits that under the foregoing arguments three separate and different cases have been presented, under each of which appellant is entitled to judgment.

In Argument I it is shown that Apache Powder Company furnished material used on the Ajo job, that it served written notice on the prime contractor within ninety days after the last of the material was furnished, that its claim is for the balance of the amount due on said material, and that the plain and simple language of the Miller Act, under these circumstances shown by undisputed evidence, authorizes and requires judgment in its favor on the prime contractor's payment bond.

In Arguments II, III, IV, and V, again by undisputed evidence, it is shown that Apache Powder Company was not chargeable with notice or knowledge of the change in subcontracts and subcontractors, and acted as a reasonable and prudent person after carefully considering all the information it received, and under the provisions of the Miller Act should not be denied its right to recover the amount of its claim because of the change in subcontracts and subcontractors.

In Argument VI it is shown that, in any event, Apache Powder Company's oral notice of its claim made on March 19, 1957, and the written evidence of the receipt of this notice by the prime contractor, complied with the notice requirements of the statute.

Judgment for the prime contractor and its surety should be reversed, and the District Court should be ordered to enter judgment against them in favor of appellant.

Respectfully submitted,

EVANS, KITCHEL & JENCKES

By ALFRED B. CARR

RALPH J. LESTER

*Attorneys for Appellant*

**APPENDIX**

Act of Congress of August 24, 1935, c. 642, §§ 1, 2, 49 Stat. 793, 794, 40 U.S.C.A. §§ 270 a, 270b

§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country

(a) Before any contract, exceeding \$2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than

the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, § 1, 49 Stat. 793.

§270b. Same; rights or persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794.



Front page and supplemental sheet of Sub-contract Agreement No. 7, dated March 30, 1956, from Ashton-Mardian Company to Pioneer Constructors (Plaintiff Armco's exhibit 6 in evidence)

## SUB-CONTRACT AGREEMENT

No. 7

ASHTON-MARDIAN COMPANY  
(Joint Venture)

Post Office Box 277  
Ajo, Arizona

THIS AGREEMENT made this 30th day of March, 1956, by and between ASHTON-MARDIAN COMPANY, hereinafter called the Contractor, and PIONEER CONSTRUCTORS, hereinafter called the Sub-Contractor,

### WITNESSETH:

That the Contractor and the Sub-Contractor for the consideration hereinafter named, agree as follows:

Section 1. The Sub-Contractor agrees to furnish all labor, material, equipment and tools to perform all work as described below, in accordance with the general conditions of the Contract (which is available for inspection at all times at the office of the Contractor) by the Owner and the Contractor and in accordance with the drawings and specifications prepared by Corps of Engineers, U.S. Army hereinafter called the Architect-Engineer, all of which general conditions, drawings and specifications signed by the parties thereto are identified by the Architect-Engineer and form a part of the Contract between the Contractor and the Owner, dated March 30, 1956, and hereby becomes a part of this Contract for Air Force Station TM-181 at Ajo, Arizona for Corps of Engineers, U.S. Army hereinafter called the Owner:

All work in accordance with Plans and Specifications and Addenda Nos 1, 2 and 3 and as defined in Specification Part 4, entitled "TECHNICAL PROVISIONS", under  
Section 2, CLEARING AND GRUBBING  
Section 3, EXCAVATION, EMBANKMENT and  
PREPARATION OF SUBGRADE

- Section 4, PIPE CULVERTS,
- Section 6, STABILIZED AGGREGATE BASE COURSE
- Section 7, BITUMINOUS PRIME COAT
- Section 8, BITUMINOUS ROAD MIX SURFACE  
COURSE
- Section 9, BITUMINOUS SEAL COAT
- Section 10, GUARD RAIL, GUIDE POSTS, TRAFFIC  
SIGNS, DEPTH GAUGES, WHEEL  
BUMPERS, TRAFFIC PAINTING, and  
CATTLE GUARDS.
- EXCLUSIONS: DEPTH GAUGES,  
WHEEL BUMPERS,  
TRAFFIC PAINTING  
AND CATTLE  
GUARDS.

#### PAYMENT AS PER ATTACHED SHEET.

DO-C2-Certified under DMS Regulation #2.

Section 2. The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project in accordance with Specifications and as directed by Contractor.

Section 3. The Contractor agrees to pay the Sub-Contractor for the performance of his work the sum of \$401,217.83. Payment will be made monthly on approved pay requests, submitted by the end of the month for which payment is requested, for 90 per cent of all work completed to date (as defined in the General Contract). Each payment, including final payment which shall not become due until all of the work has been completed to the full satisfaction of the Architect-Engineer or Owner, will be made to the Sub-Contractor within 5 days after receipt of related payment by the Contractor from the Owner.

Section 4. The Contractor and Sub-Contractor agree to be bound by the terms of the Agreement, general conditions, drawings, and specifications as far as applicable to this Sub-Contract and also by the terms and conditions as set forth on the reverse side entitled "Terms and Conditions," which are specifically incorporated herein and made a part hereof.

The Contractor and Sub-Contractor for themselves and their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants of this Agreement.

IN WITNESS WHEREOF, they have executed this Agreement the date above written.

PIONEER CONSTRUCTORS

Sub-Contractor

J. E. SKORPICK  
President

ASHTON-MARDIAN  
COMPANY

HAROLD ASHTON

March 30, 1956

SUPPLEMENTAL SHEET TO SUBCONTRACT NO. 7.  
PIONEER CONSTRUCTORS.

AIR FORCE STATION, TM-181

Bid

Item

24	Excavation	102,755 cy @	\$ 1.84	\$189,069.20
25	Borrow	10,000 cy	1.70	17,000.00
26	Grader Ditch	6,906 L'	.12	828.72
27	15" CMP	76 L'	6.50	494.00
28	24" CMP	2,444 L'	8.75	21,385.00
29	36" CMP	570 L'	14.00	7,980.00
30	48" CMP	180 L'	21.00	3,780.00
31	Metal End Section for 24" Pipe	4 ea	65.00	260.00
32	Metal End Section for 36" Pipe	4 ea	135.00	540.00
39	Stab. Aggregate Base Course	15,285 cy	3.79	57,930.15
40	Prime Coat	155 ton	46.00	7,130.00
41	Bit. Road-Mix Surface Course	95,246 sy	.31	29,526.26
42	Cutback Asphalt for Bituminous road-mix Surface Course	820 ton	49.00	40,180.00
43	Emulsified Asphalt for Seal Coat	80 ton	46.00	3,680.00
44	Cover Aggregate for Seal Coat	716 ton	6.50	4,654.00
45	Metal Guard Rail	2,290 L	5.25	12,022.50
47	Guide Posts	458 ea	7.50	3,435.00
48	Traffic Signs	54 ea	24.50	1,323.00
				<hr/> \$401,217.83

QUANTITIES SHOWN ARE APPROXIMATE ONLY AND ARE SUBJECT TO DETERMINATION BY THE CORPS OF ENGINEERS AT COMPLETION OF PROJECT.

PIONEER CONSTRUC-  
TORS

ASHTON-MARDIAN  
COMPANY

By /s/ J. E. SKORPICK  
Pres.

By /s/ HAROLD ASHTON

---

Front page and supplemental sheet of Sub-contract Agreement No. 128, dated November 1, 1956, from Ashton-Mardian Company to Construction Materials Company (Plaintiff Armco's exhibit 7 in evidence)

### SUB-CONTRACT AGREEMENT

No. 128

ASHTON-MARDIAN COMPANY  
(Joint Venture)

Post Office Box 277  
Ajo, Arizona

THIS AGREEMENT made this 1st day of November, 1956, by and between ASHTON-MARDIAN COMPANY, hereinafter called the Contractor, and CONSTRUCTION MATERIALS COMPANY, hereinafter called the Sub-Contractor,

### WITNESSETH:

That the Contractor and the Sub-Contractor for the consideration hereinafter named, agree as follows:

Section 1. The Sub-Contractor agrees to furnish all labor, material, equipment and tools to perform all work as described below, in accordance with the general conditions of the Contract (which is available for inspection at all times at the office of the Contractor) by the Owner and the Contractor and in accordance with the drawings and specifications prepared by Corps of Engineers, U.S. Army hereinafter called the Architect-Engineer, all of which general conditions, drawings and specifications signed by the parties thereto are identified by the Architect-Engineer and form a part of the Contract between the Contractor and the Owner, dated November 1, 1956, and hereby becomes a part of this Contract for Air Force Station



TM-181 at Ajo, Arizona for Corps of Engineers, U. S. Army hereinafter called the Owner:

All work in accordance with Plans and Specifications and Addenda Nos. 1, 2 and 3 and as defined in Specification Part 4, entitled "TECHNICAL PROVISIONS", under

- Section 2 CLEARING AND GRUBBING
- Section 3 EXCAVATION, EMBANKMENT and  
PREPARATION OF SUBGRADE
- Section 4 PIPE CULVERTS
- Section 6 STABILIZED AGGREGATE BASE  
COURSE
- Section 7 BITUMINOUS PRIME COAT
- Section 8 BITUMINOUS ROAD MIX SURFACE  
COURSE
- Section 9 BITUMINOUS SEAL COAT
- Section 10 GUARD RAIL, GUIDE POSTS, TRAFFIC  
SIGNS, DEPTH GAUGES, WHEEL  
BUMPERS, TRAFFIC PAINTING and  
CATTLE GUARDS.  
EXCLUSIONS: DEPTH GAUGES,  
WHEEL BUMPERS,  
TRAFFIC PAINTING  
AND CATTLE  
GUARDS.

PAYMENT AS PER ATTACHED SHEET. DO-C2-Certified under DMS Regulation #2.

Section 2. The Sub-Contractor agrees to perform the work progressively as directed by the Contractor and complete the entire project by in accordance with specifications and as directed by Contractor.

Section 3. The Contractor agrees to pay the Sub-Contractor for the performance of his work the sum of \$266,391.66. Payment will be made monthly on approved pay requests, submitted by the end of the month for which payment is requested, for 90 per cent of all work completed to date (as defined in the General Contract). Each payment, including final payment which shall not become due until all of the work has been completed to the full satisfaction of the Architect-Engineer or Owner, will be made to the Sub-Contractor within 5

days after receipt of related payment by the Contractor from the Owner.

Section 4. The Contractor and Sub-Contractor agree to be bound by the terms of the Agreement, general conditions, drawings, and specifications as far as applicable to this Sub-Contract and also by the terms and conditions as set forth on the reverse side entitled "Terms and Conditions," which are specifically incorporated herein and made a part hereof.

The Contractor and Sub-Contractor for themselves and their successors, executors, administrators and assigns, hereby agree to the full performance of the covenants of this Agreement.

IN WITNESS WHEREOF, they have executed this Agreement the date above written.

CONSTRUCTION MA-  
TERIALS CO.  
Sub-Contractor

ASHTON-MARDIAN  
COMPANY

By T. E. MOORE  
Vice-President

HAROLD ASHTON

November 1, 1956

# SUPPLEMENTAL SHEET TO SUBCONTRACT NO. 7

CONSTRUCTION  
MATERIALS CO.

AIR FORCE STATION, TM-181

## Bid Item

24	Excavation	27,810 c.y.	@ \$ 1.84	51,170.40
25	Borrow	24,000 c.y.	1.70	40,800.00
26	Grader Ditch	5,205 L.F.	.12	624.60
27	15" CMP	76 L.F.	6.50	494.00
28	24" CMP	1,061 L.F.	8.75	9,283.75
29	36" CMP	272 L.F.	14.00	3,808.00
31	Metal End Section for 24" Pipe	3 EA.	65.00	195.00
32	Metal End Section for 36" Pipe	1 EA.	135.00	135.00
39	Stab. Aggregate Base Course		3.79	57,930.15
40	Prime Coat		46.00	7,130.00
41	Bit. Surface Course		.31	29,526.26
42	Cut Back Asphalt		49.00	40,180.00

43	Emulsified Asphalt		
	Seal Coat	46.00	3,680.00
44	Cover Agg. for		
	Seal Coat	6.50	4,654.00
45	Metal Guard Rail	5.25	12,022.50
47	Guide Posts	7.50	3,435.00
48	Traffic Signs	24.50	1,323.00
			<u>\$266,391.66</u>

QUANTITIES SHOWN ARE APPROXIMATE ONLY  
AND ARE SUBJECT TO DETERMINATION BY THE  
CORPS OF ENGINEERS AT COMPLETION OF PROJECT.

CONSTRUCTION	ASHTON-MARDIAN
MATERIALS COMPANY	COMPANY
By /s/ T. E. MOORE	By /s/ HAROLD ASHTON
Title	Title

---

Notice of claim against Pioneer Constructors made by Apache Powder Company, dated April 25, 1957, addressed to Ashton-Mardian Company (Joint Venture), Ashton Building Company, and Mardian Construction Company, and mailed by Registered Mail (Plaintiff Apache's exhibit 6 in evidence)

EVANS, KITCHEL & JENCKES  
8th Floor Title & Trust Building  
Phoenix, Arizona  
April 25, 1957

#### REGISTERED MAIL

Ashton-Mardian Company (Joint Venture)  
P. O. Box 7065  
Tucson, Arizona

Ashton Building Company  
P. O. Box 7065  
Tucson, Arizona

Mardian Construction Company  
1314 North 21st Avenue  
Phoenix, Arizona

Re: Corps of Engineers, U. S. Army  
Contract for Air Force Station  
TM-181 at Ajo, Arizona

Gentlemen:

Pursuant to subparagraph (a), § 270b, Title 40, United States Code Annotated, you are hereby notified as the contractor in the above-mentioned contract, who furnished the Payment Bond to the United States of America, that from and including June 13, 1956, to and including March 12, 1957, Apache Powder Company of Benson, Arizona, furnished or supplied materials consisting of explosives and blasting supplies to Pioneer Constructors and Construction Materials Company of Tucson, Arizona, for use in the prosecution of the work provided for in said above-mentioned contract, in the amount of Thirty-three Thousand Four Hundred Fifty-three and 71/100ths Dollars (\$33,453.71), of which Twelve Thousand Five Hundred Fifty-three and 02/100ths Dollars (\$12,553.02) has been paid, leaving a balance of Twenty Thousand Nine Hundred and 69/100ths Dollars (\$20,900.69).

The last of said materials was furnished on March 12, 1957, and all of said materials was delivered by Apache Powder Company on the job and was used in the prosecution of the work provided for in said above-mentioned contract.

Yours very truly,

APACHE POWDER COMPANY

By EVANS, KITCHEL & JENCKES

By /s/ William A. Evans

Attorneys for Apache Powder Company



## INDEX OF EXHIBITS

*Exhibit**Marked for  
Ident.**Marked in  
Evid.*

### PLAINTIFF ARMCO'S EXHIBITS

- |  |    |     |
|--|----|-----|
| 1. Letter dated 9/25/56 from Ashton-Mardian Co. to District Engineer and list of subcontractors .....  | 93 | 94  |
| 2. Copy of letter dated from 4/21/56 from Project Engineer to Ashton Bldg. Co., et al, regarding list of subcontractors .....  | 97 | 98  |
| 3. Certified copies:<br>Government contract with Ashton-Mardian Co. for Air Force Station TM-181<br>Payment bond from Ashton-Mardian Co. and Travelers Indemnity Co.<br>Powers of Attorney ..... | 97 |     |
| 6. Subcontract No. 7 from Ashton-Mardian Co. to Pioneer Constructors   |    | 108 |
| 7. Subcontract No. 128 from Ashton-Mardian Co. to Construction Materials Co. ....  |    | 108 |

### PLAINTIFF APACHE'S EXHIBITS

- |   |     |     |
|---|-----|-----|
| 1. Copy of letter dated 3/19/57 from Mardian Construction Co. to Harold Ashton regarding Apache Powder Company's claim against Pioneer Constructors ..... | 137 | 138 |
| 2. Letter dated 10/3/57 from Construction Materials Co. to Apache Powder Co. returning monthly statement of 9/30/57 to Pioneer Constructors .....         | 183 | 183 |

3. Apache Powder Co. factory orders from 6/13/56 to 3/12/57 addressed to Pioneer Constructors, covering all material delivered on Ajo job, with pencilled notations of information received over phone when order taken, truck inspection reports, and office copy of bills of lading .....	188	191
4. Apache Powder Co. invoices to Pioneer Constructors on orders from from 6/13/56 to 3/12/57, with bills of lading showing material receipted for in name of Pioneer Constructors .....	191	196
5. Copies of monthly statements from Apache Powder Company to Pioneer Constructors .....	196	197
6. Copy of notice dated 4/25/57 from Apache Powder Co. to Ashton-Mardian Company (Joint Venture), Ashton Building Company, and Mardian Construction Company of Apache Powder Company's claim against Pioneer Constructors, mailed by registered mail .....	203	204
7-A, 7-B, 7-C		
Registry Receipts from Ashton-Mardian Company (Joint Venture), Ashton Building Company, and Mardian Construction Company for notices of claim by Apache Powder Company against Pioneer Constructors .....	204	204
8. Credit Memo dated 8/28/57 to Pioneer Constructors for \$175.00 for blasting machine from Apache Powder Co. ....	205	206

9. Credit Memo dated 8/14/57 to Pioneer Constructors for \$1,777.73 for material returned to Apache Powder Co. ....	205	206
10. Envelope addressed from Apache Powder Co. to Pioneer Constructors, postmarked 8/22/57, marked "Return to Writer," "Out of Business" .....	207	208
11-A Remittance slip from check dated 12/27/56 for \$4,723.37 from Construction Materials Co., Construction Division, to Apache Powder Co. ....	208	209
11-B Remittance slip from check dated 2/12/57 for \$3,417.74 from Construction Materials Co., Construction Division, to Apache Powder Co. ....	208	209
11-C Remittance slip from check dated 4/10/57 for \$4,411.91 from Construction Materials Co., Construction Division, to Apache Powder Co. ....	208	209

#### DEFENDANT HARTFORD'S EXHIBITS

B Apache Powder Company's statements to Pioneer Constructors, with invoices and truck bills of lading for material supplied during November, 1956 .....	167	169
C Apache Powder Company's statements to Pioneer Constructors, with invoices and truck bills of lading for material supplied during December, 1956 .....	167	169
D Apache Powder Company's statements to Pioneer Constructors, with		

	invoices and truck bills of lading for material supplied during January, 1957 .....	167	169
E	Apache Powder Company's statements to Pioneer Constructors, with invoices and truck bills of lading for material supplied during February and March, 1957 .....	167	169
F	Check and remittance slip dated 12/27/56 for \$4,723.37 from Construction Materials Co., Construction Materials Co., Construction Division, to Apache Powder Co. ....	167	169
G	Check and remittance slip dated 2/12/57 for \$3,417.74 from Construction Materials Co., Construction Materials Co., Construction Division, to Apache Powder Co. ....	167	169
H	Check and remittance slip dated 4/10/57 for \$4,411.91 from Construction Materials Co., Construction Materials Co., Construction Division, to Apache Powder Co. ....	167	169
I	Correct copy of remittance slip dated 2/12/57 for \$3,417.74 from Construction Materials Co., Construction Materials Co., Construction Division, to Apache Powder Co. ....	167	169

#### DEFENDANT ASHTON'S EXHIBITS

A	Apache Powder Company's statement of Pioneer Constructors account as of 11/28/56 .....	220	221
B	Letter from Apache Powder Company to Ashton-Mardian Company dated 4/12/57 regarding account with and claim against Pioneer Constructors....	222	222